

# Revolving Loan Fund (RLF) Terms and Conditions

**Please note that these Terms and Conditions (T&Cs) apply to brownfields grants under CERCLA 104(k) and those that chose to transition to 104(k).**

**They do not apply to pre-FY 2003 grants subject to 104(d).**

## I. GENERAL FEDERAL REQUIREMENTS

### A. Federal Policy and Guidance

1. a. Cooperative Agreement Recipients: In implementing this agreement, the cooperative agreement recipient (CAR) shall comply with and require that work done by borrowers and subgrant recipients with cooperative agreement funds comply with the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 104(k). The CAR will ensure that cleanup activities supported with cooperative agreement funding comply with all applicable Federal and State laws and regulations. The CAR will ensure cleanups are protective of human health and the environment.
- b. CAR's must consider whether they are required to have borrowers or subgrant recipients conduct cleanups under a State or Tribal response program. If the CAR chooses not to require borrowers and subgrant recipients to participate in a State or Tribal response program, then the CAR is required to consult with the Environmental Protection Agency (EPA) on each loan or subgrant to ensure the proposed cleanup is protective of human health and environment.
- c. **Optional T&C for CAR recipients that choose to participate in State or Tribal response programs that do not have a promulgated program.** If the State or Tribe does not have a promulgated Response Program, then the CAR is required to consult with the Environmental Protection Agency (EPA) to ensure protectiveness of human health and environment.
2. a. Borrowers and Subgrant recipients: A term and condition or other legally binding provision shall be included in all loans and subgrants entered into with the funds under this agreement, or when funds awarded under this agreement are used in combination with non-Federal sources of funds, to ensure that borrowers and subgrant recipients comply with all applicable Federal and State laws and requirements. In addition to CERCLA 104(k) Federal applicable laws and requirements include:
  - b. 40 CFR 31 and OMB Circular A-87 for governmental recipients of subgrants or 40 CFR 30 and OMB Circular A-122 for non-profit recipients of subgrants and 40 CFR 30 and OMB Circular A-21 for educational institutions recipients of

subgrants.

- c. CERCLA 104(g) requires that borrowers and subgrantees comply with the prevailing wage rate requirements under the Davis-Bacon Act of 1931 for construction, repair or alteration contracts “funded in whole or in part” with funds provided under this agreement. The CAR must ensure that the borrower or subgrantee obtains recent and applicable wage rates from the U.S. Department of Labor and incorporate them into the construction, alteration or repair contract.
- d. The recipient agrees to comply with Executive Order 13202 (Feb. 22, 2001, 66 Fed. Reg. 11225 ) of February 17, 2001, entitled "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects," as amended by Executive Order 13208 (April 11, 2001, 66 Fed. Reg. 18717) of April 6, 2001, entitled "Amendment to Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects.
- e. Federal cross-cutting requirements including, but not limited to, MBE/WBE requirements found at 40 CFR 31.36(e) or 40 CFR 30.44(b); OSHA Worker Health & Safety Standard 29 CFR 1910.120; the Uniform Relocation Act; Historic Preservation Act; Endangered Species Act; and Permits required by Section 404 of the Clean Water Act; Executive Order 11246, Equal Employment Opportunity, and implementing regulations at 41 CFR 60-4; Contract Work Hours and Safety Standards Act, as amended (40 USC 327-333) the Anti Kickback Act (40 USC 276c) and Section 504 of the Rehabilitation Act of 1973 as implemented by Executive Orders 11914 and 11250.

## **B. Eligible Brownfields Site Determinations**

- 1.
  - a. The CAR must provide information about site-specific work prior to incurring any costs under this cooperative agreement for sites that have not already been pre-approved in the CAR’s work plan by the EPA. The information that must be provided includes whether or not the site meets the definition of a brownfields as defined in §101(39) of CERCLA, the identity of the owner, and the date of acquisition.
  - b. If the site is excluded from the general definition of a brownfield, but is eligible for a property-specific funding determination, then the CAR must provide information sufficient for EPA to make a property-specific funding determination. The CAR must provide sufficient information on how financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes. The CAR must not incur costs for cleaning up sites requiring a property-specific funding determination by EPA until the EPA Project Officer has advised the CAR of the Agency’s determination.

2. a. For any petroleum-contaminated brownfields site that is not included in the CAR's EPA approved work plan, the CAR shall provide sufficient documentation to the EPA prior to incurring costs under this cooperative agreement which includes:
  - (1) that a State has determined that the petroleum-only site is of relatively low risk, as compared to other petroleum-only sites in the State,
  - (2) that the State determines there is "no viable responsible party" for the site;
  - (3) that the State determines that the person assessing, investigating, or cleaning up the site is a person who is not potentially liable for cleaning up the site; and
  - (4) that the site is not subject to any order issued under section 9003(h) of the Solid Waste Disposal Act.This documentation must be prepared by the CAR or the State following contact and discussion with the appropriate petroleum program official.
- b. Documentation must include the identity of the State program official contacted, the State official's telephone number, the date of the contact, and a summary of the discussion to reach each determination that the site is of relatively low risk, that there is no viable responsible party and that the person assessing, investigating, or cleaning up the site is a person who is not potentially liable for cleaning up the site. Other documentation provided by a State to the recipient relevant to any of the determinations by the State must also be provided to the EPA Project Officer.
- c. If the State chooses not to make the determinations described in 2.a. above, the CAR must contact the EPA Project Officer and provide the information necessary for EPA to make the requisite determinations.
- d. EPA must also make all determinations on the eligibility of petroleum-contaminated brownfields sites located on Indian tribal lands. Prior to incurring costs for these sites, the CAR must contact EPA Project Officer and provide the information necessary for EPA to make the determinations described in 2.a.

## **II. GENERAL COOPERATIVE AGREEMENT ADMINISTRATIVE REQUIREMENTS**

### **A. Term of the Agreement**

3. The term of an RLF agreement is five years, unless otherwise extended by EPA at the CAR's request.
2. If after 4 years, EPA determines that the recipient has not made sufficient progress in

implementing its RLF, the EPA may terminate the agreement.

## **B. Substantial Involvement**

4. The U.S. EPA may be substantially involved in overseeing and monitoring this cooperative agreement.
  - a. Substantial involvement by the U.S. EPA generally includes administrative activities such as: monitoring; review and approval of procedures for loan and subgrant recipient selection; review of project phases; and approval of substantive terms included in professional services contracts.
  - b. Substantial EPA involvement also includes brownfields property-specific funding determinations described in I. B.1. under *EPA and/or State Approvals of Brownfields Sites* above. The CAR may also request technical assistance from EPA on what sites qualify as a brownfields site and when determining whether the statutory prohibition found in section 104(k)(4)(B)(i)(IV) of CERCLA applies to potential borrower/subgrant recipients. Generally, this prohibition prohibits a loan or subgrant recipient from using grant funds to cleanup a site if the recipient is potentially liable under §107 of CERCLA for that site.
  - c. Substantial EPA involvement may include reviewing financial and environmental status reports; and monitoring all reporting, record-keeping, and other program requirements.
  - d. EPA may waive any of the provisions in term and condition II. B.1., at its own initiative or upon request by the CAR. EPA will provide waivers in writing.
5. Effect of EPA's substantial involvement includes:
  - a. EPA's review of any project phase, document, or cost incurred under this cooperative agreement, will not have any affect upon CERCLA §128 *Eligible Response Site* determinations or for rights, authorities, and actions under CERCLA or any Federal statute.
  - b. The CAR remains responsible for ensuring that all cleanups are protective of human health and the environment and comply with all applicable Federal and State laws.
  - c. The CAR remains responsible for ensuring costs are allowable under applicable OMB Circulars.

## **C. Cooperative Agreement Recipient Roles and Responsibilities**

6. The CAR must acquire the services of a qualified environmental professional(s) to

coordinate, direct, and oversee the brownfields assessment and cleanup activities at a particular site, if they do not have such a professional on staff.

7. The CAR shall act as or appoint a qualified “fund manager” to carry out responsibilities that relate to financial management of the loan and/or subgrant program. However, the CAR remains accountable to EPA for the proper expenditure of cooperative agreement funds. Any funding arrangements between the CAR and the fund manager for services performed must be consistent with 40 CFR Part 31.
3. The CAR is responsible for ensuring that borrowers and subgrant recipients comply with the terms of their agreements with the CAR, and that agreements between the CAR and borrowers and subgrant recipients are consistent with the terms and conditions of this agreement.

#### **D. Quarterly Progress Reports**

8. The CAR must submit progress reports on a quarterly basis (30 days after the end of each Federal fiscal quarter) to the EPA Project Officer. The progress reports must document incremental progress at achieving the project goals and milestones. Quarterly progress reports must include:
  - a. Documentation of progress at meeting the performance objectives, project narrative and project time line.
  - b. An update on project milestones.
  - c. A budget recap summary page with the following headings: Current Approved Budget; Costs Incurred this Quarter; Costs Incurred to Date; and Total Remaining Funds.
  - d. If applicable, quarterly reports must specify costs incurred at petroleum-only brownfields sites.
  - e. Recipient quarterly reports must clearly identify which activities performed during the reporting period were undertaken with EPA funds, and will relate EPA-funded activities to the objectives and milestones agreed upon in the work plan including a list of sites where cleanup (either through loans or subgrants) activities were completed. To the extent consistent with the scope of work for this agreement, activities undertaken with EPA funds to be included in quarterly performance and financial reporting include:
    1. Acres per property(ies)
    2. No cleanup required
    3. Cleanup completed
    4. Types of contaminants removed/addressed
    5. Acres of greenspace created/preserved
    6. Number of properties with one(1) or more engineering/institutional controls
    7. Redevelopment underway
    8. Number/value of loans made
    9. Number/value of subgrants made
    10. Funds leveraged
    11. Jobs leveraged

12. Health monitoring studies, insurance, and/or institutional controls funded
2. The CAR must maintain records that will enable it to report to EPA on the amount of costs incurred by the CAR, borrowers or subgrant recipients at petroleum-contaminated brownfields sites.
3. The CAR must complete Property Profile Forms provided by EPA.

### **III. FINANCIAL ADMINISTRATION REQUIREMENTS**

#### **A. Cost Share Requirement (Note: Do not use if cost-share waived by EPA.)**

9. CERCLA §104(k)(9)(B)(iii) requires the recipient of this cooperative agreement to pay a cost share (which may be in the form of a contribution of money, labor, material, or services from a non-federal source) of at least 20 percent (i.e., 20 percent of the total federal funds awarded). The cost share contribution must be for costs that are eligible and allowable under the cooperative agreement and must be supported by adequate documentation.

#### **B. Eligible Uses of the Funds for the Cooperative Agreement Recipient, Borrower, and/or Subgrant Recipients**

10. To the extent allowable under the EPA approved scope of work, cooperative agreement funds may be used for eligible programmatic expenses to capitalize the RLF and conduct cleanups.
11. The CAR must maintain records that will enable it to report to EPA on the amount of costs incurred by the CAR, borrowers or subgrant recipients at petroleum-only brownfields sites.
12. Up to 60% of the funds must be used by the CAR to provide loans for the cleanup of eligible brownfields sites and for eligible programmatic costs for managing the RLF. Up to 40% can be used for subgrants to cleanup eligible brownfield sites under the RLF and for eligible programmatic costs for managing the subgrant (note: cleanup subgrants are limited to \$200,000 per site).
13. To determine whether a cleanup subgrant is appropriate, the CAR must consider:
  - a. The extent the subgrant will facilitate the creation of, preservation of, or addition to a park, greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;
  - b. The extent the subgrant will meet the needs of a community that has the inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community;
  - c. The extent the subgrant will facilitate the use or reuse of existing infrastructure;

and

- d. The benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation.

The CAR must maintain sufficient records to support and document these determinations.

- 5. The CAR may use cooperative agreement funds to capitalize a revolving loan fund to be used for loans or subgrants for cleanup and for eligible programmatic expenses. Eligible programmatic expenses include:
  - a. Determining whether RLF cleanup activities at a particular site are authorized by CERCLA 104(k);
  - b. Ensuring that a RLF cleanup complies with applicable requirements under Federal and State laws, as required by CERCLA 104(k);
  - c. Ensuring that public participation requirements are met. This includes developing or funding a community relations plan which will include reasonable notice, opportunity for involvement, and response to comments;
  - d. Establishing an administrative record for each site;
  - e. Ensuring the adequacy of each RLF cleanup as it is implemented, including overseeing the borrowers and/or subgrantees activities to ensure compliance with applicable Federal and State environmental requirements;
  - f. The development of Quality Assurance Project Plans (QAPPs) as required by Part 31 and Part 30 regulations;
  - g. Ensuring that the site is secure if a borrower or subgrant recipient is unable or unwilling to complete a brownfields cleanup;
  - h. Preparing an analysis of brownfields cleanup alternatives which will include information about the site and contamination issues (i.e., exposure pathways, identification of contaminant sources, etc.); cleanup standards; applicable laws; alternatives considered; and the proposed cleanup. The evaluation of alternatives must include effectiveness, implementability, and the cost of the response proposed. The evaluation will include an analysis of reasonable alternatives including no action;
  - i. For brownfields petroleum-contaminated sites, an analysis of cleanup alternatives would include considering a range of proven cleanup methods including identification of contaminant sources, exposure pathways, and an evaluation of corrective measures;
  - j. Purchasing environmental insurance if the purchase of such insurance is

necessary to carry out cleanup activities;

- k. Any other eligible programmatic costs including costs incurred by the recipient in making and managing a loan; obtaining financial management services; quarterly reporting to EPA; awarding and managing subgrants; and carrying out outreach pertaining to the loan and subgrant program to potential borrowers and subgrant recipients; and
  - 1. Subgrantee progress reporting to the CAR is an eligible programmatic cost.
- C.**
- 1. **Local Governments only.** No more than 10% of the funds awarded by this agreement may be used by the CAR itself as a programmatic cost for brownfield program development and implementation (including monitoring of health and institutional controls) as described in Task \_\_\_ of the EPA approved scope of work. The CAR must maintain records on funds that will be used to carry out Task \_\_ of its EPA approved scope of work to ensure that no more than 10% of its funds are used for brownfield program development and implementation (including monitoring of health and institutional controls).
  - 2. If the CAR makes a subgrant to a local government that includes an amount (not to exceed 10% of the subgrant) for brownfields program development and implementation, the terms and conditions of that agreement must include a provision that ensures that the local government subgrantee maintains records adequate to ensure compliance with the limits on the amount of subgrant funds that may be expended for this purpose.
4. Ineligible Uses of the Funds for the Cooperative Agreement Recipient, Borrower, and/or Subgrant Recipients
- 1. Cooperative agreement funds shall not be used by the CAR, borrower and/or subgrant recipient for any of the following activities:
    - a. Pre-cleanup environmental activities such as planning, inventory, site assessment, identification, and characterization. However, the CAR may request EPA approval for limited site assessment on a case-by-case basis when necessary to ensure protection of the environment and public health through cleanup actions.
    - b. Monitoring and data collection necessary to apply for, or comply with, environmental permits under other Federal and State laws, unless such a permit is required as a component of the brownfields cleanup.
    - c. Development activities that are not brownfields cleanup activities (e.g., construction of a new facility or marketing of a property).
    - d. Job training unrelated to performing a specific cleanup at a site covered by a loan or subgrant.



5. To pay for a penalty or fine.
  6. To pay a federal cost share requirement (for example, a cost-share required by another Federal grant) unless there is specific statutory authority.
  7. To pay for a response cost at a brownfields site for which the recipient of the subgrant or loan is potentially liable under CERCLA §107.
  8. To pay a cost of compliance with any federal law, excluding the cost of compliance with laws applicable to the cleanup.
  9. Unallowable costs (e.g., lobbying and fund raising) under applicable OMB Circulars.
2. Under CERCLA 104(k)(4)(B), administrative costs are prohibited costs under this agreement. Prohibited administrative costs include all indirect costs under applicable OMB Circulars incurred by the CAR and subgrantees.
- a. Ineligible administrative costs include costs incurred in the form of salaries, benefits, contractual costs, supplies, and data processing charges, incurred to comply with most provisions of the *Uniform Administrative Requirements for Grants* contained in 40 CFR Part 30 or 40 CFR part 31. Direct costs for grant and subgrant administration, with the exception of costs specifically identified as eligible programmatic costs, are ineligible even if the grantee or subgrant recipient is required to carry out the activity under the grant agreement. Costs incurred to report quarterly performance to EPA under the grant are eligible.
  - b. Ineligible grant or subgrant administration costs include:
    - (1) Preparation of applications for Brownfields grants and subgrants;
    - (2) Record retention required under 40 CFR 30.53 and 40 CFR 31.42;
    - (3) Record-keeping associated with supplies and equipment purchases required under 40 CFR 30.33, 30.34, and 30.35 and 40 CFR 31.32 and 31.33;
    - (4) Preparing revisions and changes in the budgets, scopes of work, program plans and other activities required under 40 CFR 30.25 and 40 CFR 31.30;
    - (5) Maintaining and operating financial management systems required under 40 CFR 30 and 40 CFR 31;
    - (6) Preparing payment requests and handling payments under 40 CFR 30.22 and 40 CFR 31.21;
    - (7) Non-federal audits required under 40 CFR 30.26, 40 CFR 31.26, and OMB

(8) Close out under 40 CFR 30.71 and 40 CFR 31.50.

3. Borrowers are subject to the CERCLA 104(k)(4)(B) administrative cost prohibition requirements. The CAR must ensure that loan agreements prohibit borrowers and subgrantees from using loans financed with cooperative agreement funds for administrative costs.
  - a. Prohibited administrative costs for the borrower (including those in the form of salaries, benefits, contractual costs, supplies, and data processing charges) are those incurred for loan administration and overhead costs.
  - b. Direct costs for loan administration are ineligible even if the borrower is required to carry out the activity under the loan agreement. Ineligible loan administration costs include expenses for:
    - (1) Preparation of applications for loans and loan agreements;
    - (2) Preparing revisions and changes in the budget, work plans, and other documents required under the loan agreement;
    - (3) Maintaining and operating financial management and personnel systems;
    - (4) Preparing payment requests and handling payments; and
    - (5) Audits.
  - c. Overhead costs by the borrower that do not directly clean up brownfields site contamination or comply with laws applicable to the cleanup are ineligible administrative costs. Examples of overhead costs that would be ineligible in loans include expenses for:
    - (1) Salaries, benefits and other compensation for person who are not directly engaged in the cleanup of the site (e.g., marketing and human resource personnel);
    - (2) Facility costs such as depreciation, utilities, and rent on the borrower's administrative offices; and
    - (3) Supplies and equipment not used directly for cleanup at the site.
  - d. Costs incurred by the borrower for procurement are eligible only if the procurement contract is for services or products that are direct costs for performing the cleanup, for insurance costs, or for maintenance of institutional controls.

- e. Direct costs by the borrower for progress reporting to the lender are eligible programmatic costs.
4. Cooperative agreement funds may not be used for any of the following properties:
- a. Facilities listed, or proposed for listing, on the National Priorities List (NPL);
  - b. Facilities subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decree issued to or entered by parties under CERCLA;
  - c. Facilities that are subject to the jurisdiction, custody or control of the United States government except land held in trust by the United States government for an Indian tribe; or
10. A site excluded from the definition of a brownfields site for which EPA has not made a property-specific funding determination.

#### **E. Subgrant Recipient and Borrower Eligibility**

14. The CAR may only provide cleanup subgrants to an eligible entity or nonprofit organization to clean up sites *owned* by the eligible entity or nonprofit organization at the time the subgrant is awarded. Eligible subgrant recipients include eligible entities as defined under CERCLA 104(k)(1) and non profit organizations as defined at Section 4(6) of the Federal Financial Assistance Management Improvement Act of 1999. Nonprofit organizations described in Section 501(c)(4) of the Internal Revenue Code that engage in lobbying activities as defined in Section 3 of the Lobbying Disclosure Act of 1995 are not eligible for subgrants.
15. The subgrant recipient must retain ownership of the site throughout the period of performance of the subgrant. For the purposes of this agreement, the term “owned” means fee simple title unless EPA approves a different arrangement. **However, the CAR may not provide a subgrant to itself or another component of its own unit of government or organization.**
16. The CAR shall not loan or subgrant funds that will be used to pay for cleanup activities at a site for which the borrower or subgrant recipient is potentially liable under CERCLA §107. The CAR may rely on its own investigation which can include an opinion from the subgrant recipient’s or borrower’s counsel. However, the CAR must advise the borrower or subgrant recipient that the investigation and/or opinion of the subgrant recipient’s or borrower’s counsel is not binding on the Federal Government.
17. For approved eligible petroleum-contaminated brownfields sites, the person assessing, investigating, or cleaning up the site must be a person who is not potentially liable for cleaning up the site. For brownfields grant purposes, an entity generally will not be considered potentially liable for petroleum contamination if it did not cause or contribute to the petroleum contamination at the site.

18. The CAR shall maintain sufficient documentation supporting and demonstrating the eligibility of the sites, borrowers, and subgrant recipients.
19. A borrower or subgrant recipient must submit information regarding its overall environmental compliance history including any penalties resulting from environmental non-compliance at the site subject to the loan or subgrant. The CAR, in consultation with the EPA, must consider this history in its analysis of the borrower or subgrant recipient as a cleanup and business risk.
20. An entity that is currently suspended, debarred, or otherwise declared ineligible cannot be a borrower or subgrant recipient.

**E. Obligations for Grant Recipients, Borrowers, or Subgrantees Asserting a Limitation on Liability from CERCLA §107**

1. Grant recipients, borrowers, or subgrantees who are eligible, or seek to become eligible, to receive a grant, loan, or subgrant based on a liability protection from CERCLA as a: (1) bona fide prospective purchaser (BFPP), (2) contiguous property owner (CPO), or (3) innocent landowner (ILO) (known as the “landowner liability protections”), must meet certain threshold criteria and satisfy certain continuing obligations to maintain their status as an eligible grant recipient, borrower, or subgrantee. These include, but are not limited to the following:
  - a. All grant recipients, borrowers, or subgrantees asserting a BFPP, CPO or ILO limitation on liability must perform (or have already performed) "all appropriate inquiry," as found in section 101(35)(B) of CERCLA, on or before acquiring the property.
  - b. Grant recipients, borrowers, or subgrantees seeking to qualify as bona fide prospective purchasers or contiguous property owners must not be:
    - (1.) potentially liable, or affiliated with any other person that is potentially liable, for response costs through (a) any direct or indirect familial relationship; or (b) any contractual, corporate, or financial relationships; or
    - (2.) a reorganized business entity that was potentially liable or
    - (3.) otherwise liable under CERCLA §107(a) as a prior owner or operator, or generator or transporter of hazardous substances to the facility.
  - c. Landowners must meet certain continuing obligations in order to achieve and maintain status as a landowner protected from CERCLA liability. These continuing obligations include:
    - (1) complying with land use restrictions and not impeding the effectiveness or integrity of institutional controls;

- (2) taking reasonable steps with respect to hazardous substance releases;
- (3) providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration;
- (4) complying with information requests and administrative subpoenas (applies to bona fide prospective purchasers and contiguous property owners); and
- (5) complying with legally required notices (again, applies to bona fide prospective purchasers and contiguous property owners) [see CERCLA § 101(40)(B)-(H), 107(q)(1)(A), 101(35)(A)-(B).].

d. CERCLA requires additional obligations to maintain liability protection. These obligations are found at §§ 101(35), 101(40), 107(b), 107(q) and 107(r).

## 6. Use of Program Income

- 21. In accordance with 40 CFR 31.25(g)(2), the CAR is authorized to add program income to the funds awarded by the EPA and use the program income under the same terms and conditions of this agreement. Program income for the RLF shall be defined as the gross income received by the recipient, directly generated by the cooperative agreement award or earned during the period of the award. Program income shall include principal repayments, interest earned on outstanding loan principal, interest earned on accounts holding RLF program income not needed for immediate lending, all loan fees and loan-related charges received from borrowers and other income generated from RLF operations including proceeds from the sale, collection, or liquidations of assets acquired through defaults of loans.
- 22. ***Note: The following is an optional T&C for Transitioned RLFs only!*** In accordance with Section 104(d)(3)(D), when a CAR transitions to a 104(k) cooperative agreement, any program income (e.g. fees, interest or principal repayments) generated prior to transition will be added to the 104(k) agreement and must be used in a manner consistent with Section 104(k)(3) and with the terms and conditions.
- ~~23.~~ The CAR may use program income from fees, interest payments from loans, and other forms of eligible program income to meet its cost-share. The CAR shall not use repayments of principal of loans to meet the CAR's cost-share requirement. Repayments of principal must be returned to the CAR's Brownfields cleanup revolving fund.
- 24. The CAR that elects to use program income to cover all or part of a RLF's programmatic costs shall maintain adequate accounting records and source documentation to substantiate the amount and percent of program income expended for eligible RLF programmatic costs, and comply with applicable OMB cost principles when charging costs against program income. For any cost determined by the EPA to have been an ineligible use of program income, the recipient shall reimburse the RLF or the EPA. EPA will notify the recipient of the time period allowed for reimbursement.

25. Loans or subgrants made with a combination of program income and direct funding from EPA are subject to the same terms and conditions as those applicable to this agreement. Loans and subgrants made with direct funding from EPA in combination with non Federal sources of funds are also subject to the same terms and conditions of this agreement.
26. CAR must obtain EPA approval of the substantive terms of loans and subgrants made entirely with program income.

#### **G. Post Cooperative Agreement Program Income**

27. After the end of the award period, the CAR shall use program income in a manner consistent with the terms and conditions of a “close out” agreement negotiated with EPA. In accordance with 40 CFR 31.42(c)(3), the CAR shall maintain appropriate records to document compliance with the requirements of the close out agreement (i.e., records relating to the use of post-award program income). EPA may request access to these records or may negotiate post-close-out reporting requirements to verify that post-award program income has been used in accordance with the terms and conditions of the close out agreement.

#### **H. Interest-Bearing Accounts**

28. The CAR must deposit advances of grant funds and program income (e.g., fees, interest payments, repayment of principal) in an interest bearing account.
  - a. Interest earned on advances, CARs and subgrant recipients are subject to the provisions of 40 CFR §31.21(i) and §30.22(l) relating to remitting interest on advances to EPA on a quarterly basis.
  - b. Interest earned on program income is considered additional program income.

### **IV. RLF ENVIRONMENTAL REQUIREMENTS**

#### **A. Authorized RLF Cleanup Activities**

29. The CAR shall prepare an analysis of brownfields cleanup alternatives which will include information about the site and contamination issues (i.e., exposure pathways, identification of contaminant sources, etc.); cleanup standards; applicable laws; alternatives considered; and the proposed cleanup. The evaluation of alternatives must include effectiveness, implementability, and the cost of the response proposed. The evaluation will include an analysis of reasonable alternatives including no action.
30. For cleanup of brownfields petroleum-only sites, an analysis of cleanup alternatives must include considering a range of proven cleanup methods including identification of

contaminant sources, exposure pathways, and an evaluation of corrective measures. The clean up method chosen must be based on this analysis.

### **B. Quality Assurance (QA) Requirements**

- ~~31.~~ If environmental samples are to be collected as part of the brownfields cleanup (e.g., cleanup verification sampling, post-cleanup confirmation sampling), the CAR shall comply with 40 CFR Part 31.45 (or 40 CFR Part 30.54 requirements for nonprofit organizations) requirements to develop and implement quality assurance practices sufficient to produce data adequate to meet project objectives and to minimize data loss. State law may impose additional QA requirements.

### **C. Community Relations and Public Involvement in RLF Cleanup Activities**

32. All RLF loan and subgrant cleanup activities require a site-specific community relations plan that includes providing reasonable notice, opportunity for involvement, response to comments, and administrative records that are available to the public.

### **D. Administrative Record**

33. The CAR shall establish an administrative record that contains the documents that form the basis for the selection of a cleanup plan. Documents in the administrative record shall include an analysis of reasonable alternatives including no action; site investigation reports; the cleanup plan; cleanup standards used; responses to public comments; and verification that shows that cleanups are complete. The CAR shall keep the administrative record available at a location convenient to the public and make it available for inspection.

### **E. Implementation of RLF Cleanup Activities**

34. The CAR shall ensure the adequacy of each RLF cleanup in protecting human health and the environment as it is implemented. Each loan and subgrant agreement shall contain terms and conditions that allow the CAR to change cleanup activities as necessary based on comments from the public or any new information acquired.
35. If the borrower or subgrant recipient is unable or unwilling to complete the RLF cleanup, the CAR shall ensure that the site is secure. The CAR shall notify the appropriate state agency and the U.S. EPA to ensure an orderly transition should additional activities become necessary.

### **F. Completion of RLF Cleanup Activities**

36. The CAR shall ensure that the successful completion of a RLF cleanup is properly

documented. This must be done through a final report or letter from a qualified environmental professional, or other documentation provided by a State or Tribe that shows cleanups are complete. This documentation needs to be included as part of the administrative record.

## **V. REVOLVING LOAN FUND REQUIREMENTS**

### **A. Prudent Lending and Subgranting Practices**

37. The CAR shall not incur costs under this cooperative agreement for loans or subgrants until an RLF work plan (? Suggested changes) has been submitted to and approved by U.S. EPA. The CAR shall ensure that the overall objectives of the fund are met through its or the fund manager's selection and structuring of individual loans and lending practices. These activities shall include, but not be limited to the following:
- a. Considering awarding subgrants on a competitive basis. If the CAR decides not to award any subgrants competitively, it must document the basis for that decision.
  - 11. Establishing appropriate project selection criteria consistent with Federal and state requirements, the intent of the RLF program, and the cooperative agreement entered into with EPA.
  - b. Establishing threshold eligibility requirements whereby only eligible borrowers or subgrant recipients receive RLF financing.
  - c. Developing a formal protocol for potential borrowers or subgrant recipients to demonstrate eligibility, based on the procedures described in the initial RLF application proposal and cooperative agreement application. Such a protocol shall include descriptions of projects that will be funded, how loan monies will be used, and qualifications of the borrower or subgrant recipient to make legitimate use of the funds. Additionally, CARs shall ask borrowers or subgrant recipients for an explanation of how a project, if selected, would be consistent with RLF program objectives, statutory requirements and limitations, and protect human health and the environment.
  - d. Requiring that borrowers or subgrant recipients submit information describing the borrower's or subgrant recipient's environmental compliance history. The CAR shall consider this history in an analysis of the borrower or subgrant recipient as a cleanup and business risk.
  - e. Establishing procedures for handling the day-to-day management and processing of loans and repayments.
  - f. Establishing standardized procedures for the disbursement of funds to the borrower or subgrant recipient.



## **B. Inclusion of Special Terms and Conditions in RLF Loan and Subgrant Documents**

38. The CAR shall ensure that the borrower or subgrant recipient meets the cleanup and other program requirements of the RLF grants by including the following special terms and conditions in RLF loan agreements and subgrant awards:
- a. Borrowers or subgrant recipients shall use funds only for eligible activities and in compliance with the requirements of CERCLA 104(k) and applicable Federal and State laws and regulations. See Section I.A.2.
  - b. Borrowers or subgrant recipients shall ensure that the cleanup protects human health and the environment.
  - c. Borrowers or subgrant recipients shall document how funds are used. If a loan or subgrant includes cleanup of a petroleum-contaminated brownfields site(s), the CAR shall include a term and condition requiring that the borrower or subgrant recipient maintain separate records for costs incurred at that site(s).
  - d. Borrowers or subgrant recipients shall maintain records for a minimum of three years following completion of the cleanup financed all or in part with RLF funds. Borrowers or subgrant recipients shall obtain written approval from the CAR prior to disposing of records. Cooperative agreement recipients shall also require that the borrower or subgrant recipient provide access to records relating to loans and subgrants supported with RLF funds to authorized representatives of the Federal government.
  - e. Borrowers or subgrant recipients shall certify that they are not currently, nor have they been, subject to any penalties resulting from environmental non-compliance at the site subject to the loan.
  - f. Borrowers or subgrant recipients shall certify that they are not potentially liable under §107 of CERCLA for the site or that, if they are, they qualify for a limitation or defense to liability under CERCLA. If asserting a limitation or defense to liability, the borrower or subgrant recipient must state the basis for that assertion. When using grant funds for petroleum-contaminated brownfields sites, borrowers or subgrant recipients shall certify that they are not a viable responsible party for the petroleum contamination at the site.
  - g. Borrowers or subgrant recipients shall conduct cleanup activities as required by the CAR.
  - h. Subgrant recipients shall comply with applicable EPA assistance regulations (40 CFR Part 31 for governmental entities or 40 CFR Part 30 for nonprofit organizations). All procurements conducted with subgrant funds must comply with 40 CFR Part 31.36 or 40 CFR Part 30.40-30.48, as applicable.

### **C. Default**

39. In the event of a loan default, the CAR shall make reasonable efforts to enforce the terms of the loan agreement including proceeding against the assets pledged as collateral to cover losses to the loan. If the cleanup is not complete at the time of default, the CAR is responsible for: (1) documenting the nexus between the amount paid to the borrower (bank or other financial institution) and the cleanup that took place prior to the default; and (2) securing the site (e.g., ensuring public safety) and informing the EPA Project Officer and the State.

### **D. Conflict of Interest**

40. The CAR shall establish and enforce conflict of interest provisions that prevent the award of subgrants that create real or apparent personal conflicts of interest, or the CAR's appearance of lack of impartiality. Such situations include, but are not limited to, situations in which an employee, official, consultant, contractor, or other individual associated with the CAR (affected party) approves or administers a grant or subgrant to a subgrant recipient in which the affected party has a financial or other interest. Such a conflict of interest or appearance of lack of impartiality may arise when:

- (i) The affected party,
  - (ii) Any member of his immediate family,
  - (iii) His or her partner, or
  - (iv) An organization which employs, or is about to employ, any of the above,
- has a financial or other interest in the subgrant recipient.

Affected employees will neither solicit nor accept gratuities, favors, or anything of monetary value from subgrant recipients. Recipients may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by affected parties.

## **VI. DISBURSEMENT, PAYMENT AND CLOSEOUT**

For the purposes of these terms and conditions, the following definitions apply: "payment" is the U.S. EPA's transfer of funds to the CAR; the CAR incurs an "obligation" when it enters into a loan agreement with the borrower or subgrant recipient; "disbursement" is the transfer of funds from the CAR to the borrower or subgrant recipient. "Close out" refers to the process that the U.S. EPA follows to ensure that all administrative actions and work required under the cooperative agreement have been completed.

## **A. Payment Schedule**

41. The CAR may request payment from EPA pursuant to 40 CFR. §31.21 after it incurs an obligation or has an eligible programmatic expense. EPA will make payments to the CAR on a schedule which minimizes the time elapsing between transfer of funds from EPA and disbursement by the recipient to the borrower or subgrant recipient to pay costs incurred or to meet a “progress payment” schedule. The recipient may request payments when it receives a disbursement request from a borrower or subgrant recipient based on the borrower or subgrant recipient’s incurred costs under the “actual expense” method or the schedule for disbursement under the “schedule” disbursement method. The CAR shall disburse accrued program income to meet all or part of this obligation or eligible programmatic expenses prior to requesting payment from EPA.

## **B. Methods of Disbursement**

42. The CAR may choose to disburse funds to the borrower by means of ‘actual expense’ or ‘schedule.’ If the schedule method is used, the recipient must ensure that the schedule is designed to reasonably approximate the borrower’s incurred costs.
  - a. An ‘actual expense’ disbursement approach requires the borrower to submit documentation of the borrower’s expenditures (e.g., invoices) to the CAR prior to requesting payment from EPA.
  - b. A ‘schedule’ disbursement is one in which all, or an agreed upon portion, of the obligated funds are disbursed to the borrower on the basis of an agreed upon schedule (e.g., progress payments) or, in unusual circumstances, upon execution of the loan. The CAR shall submit documentation of disbursement schedules to EPA.
  - c. If the disbursement schedule of the loan agreement calls for disbursement of the entire amount of the loan upon execution, the CAR shall demonstrate to the U.S. EPA Project Officer that this method of disbursement is necessary for purposes of cleaning up the site covered by the loan. Further, the CAR shall include an appropriate provision in the loan agreement which ensures that the borrower uses loan funds promptly for costs incurred in connection with the cleanup and that interest accumulated on schedule disbursements is applied to the cleanup.
43. Subgrant funds must be disbursed to the subgrant recipient in accordance with 40 CFR 31.21 or 40 CFR 30.22, as applicable.
  - a. The CAR may negotiate a predetermined schedule(s) for disbursement to subgrant recipients provided the schedule minimizes the time elapsing between disbursement by the CAR and the subgrant recipient’s payment of costs incurred in carrying out the subgrant.
  - b. If the disbursement schedule of the subgrant calls for disbursement of the

entire amount of the subgrant upon execution, the CAR shall demonstrate to the U.S. EPA Project Officer that this method of disbursement is necessary for purposes of cleaning up the site covered by the subgrant. Further, the CAR shall include an appropriate provision in the subgrant agreement which ensures that the subgrant recipient uses funds promptly for costs incurred in connection with the cleanup and that interest accumulated on schedule disbursements is applied to the cleanup.

### **C. Schedule for Closeout**

44. There are two fundamental criteria for closeout:
- (a) Final payment of funds from EPA to the CAR following expiration of the terms of the agreement or expenditure of the funds awarded; and
  - (b) Completion of all cleanup activities funded by the amount of the award. To close out the cooperative agreement all payments to the CAR must be complete. The first criterion of cooperative agreement closeout is met when the CAR receives all payments from EPA. The second closeout criterion is met when all cleanups funded by the initial amount of the award are complete.

### **D. Compliance with Closeout Schedule**

45. If a CAR fails to comply with the closeout schedule, any cooperative agreement funds not obligated under loan agreement to a borrower or subgrant recipient may be subject to federal recovery, and the cooperative agreement award amended to reflect the reduced amount of the cooperative agreement.

### **E. Recovery of RLF Assets**

46. In case of termination for cause or convenience, the CAR shall return to EPA its fair share of the value of the RLF assets consisting of cash, receivables, personal and real property, and notes or other financial instruments developed through use of the funds. EPA's fair share is the amount computed by applying the percentage of EPA participation in the total capitalization of the RLF to the current fair market value of the assets thereof. EPA also has remedies under 40 CFR 31.43 when the Agency determines that the value of such assets has been reduced by improper/illegal use of cooperative agreement funding. In such instances, the CAR may be required to compensate EPA over and above the Agency's share of the current fair market value of the assets. Nothing in this agreement limits EPA's authorities under CERCLA to recover response costs from a potentially responsible party.

### **F. Loan Guarantees** *(Note: The following is an optional T&C for the cooperative agreements that will do loan guarantees)*

1. If the CAR chooses to use the RLF funds to support a loan guarantee approach, the

following terms & conditions apply:

- a. The CAR shall:
  - (1) document the relationship between the expenditure of CERCLA §104(k) funds and cleanup activities;
  - (2) maintain an escrow account expressly for the purpose of guaranteeing loans, by following the payment requirement described under the Escrow Requirements term and condition below; and
  - (3) ensure that cleanup activities guaranteed by RLF funds are carried out in accordance with CERCLA 104(k) and applicable Federal and State laws and will protect human health and the environment.
2. a. Payment of funds to a CAR shall not be made until a guaranteed loan has been issued by a participating financial institution. Loans guaranteed with RLF funds shall be made available as needed for specified cleanup activities on a “actual expense” or “schedule” basis to the borrower or subgrant recipient (See Section on Methods of Disbursement). The CAR’s escrow arrangement shall be structured to ensure that the CERCLA §104(k) funds are properly “disbursed” by the recipient for the purposes of the assistance agreement as required by 40 CFR §31.20(b)(7) and §31.21(c). If the funds are not properly disbursed, the CERCLA §104(k) funds that the recipient places in an escrow account will be subject to the interest recovery provisions of 40 CFR §31.21(i).
- b. To ensure that funds transferred to the CAR are disbursements of assisted funds, the escrow account shall be structured to ensure that:
  - (1) the recipient cannot retain the funds;
  - (2) the recipient must not have access to the escrow funds on demand;
  - (3) the funds remain in escrow unless there is a default of a guaranteed loan;
  - (4) the organization holding the escrow (i.e., the escrow agency), shall be a bank or similar financial institution that is independent of the recipient; and
  - (5) there must be an agreement with financial institutions participating in the guaranteed loan program which documents that the financial institution has made a guaranteed loan to clean up a brownfields site in exchange for access to funds held in escrow in the event of a default by the borrower or subgrant recipient.

3. Federal Obligation to the Loan Guarantee Program
  - a. Any obligations that the CAR incurs for loan guarantees in excess of the amount awarded under the cooperative agreement are the CAR's responsibility. This limitation on the extent of the Federal Government's financial commitment to the CAR's loan guarantee program shall be communicated to all participating banks and borrower or subgrant recipient.
4. Repayment of Guaranteed Loans
  3. Upon repayment of a guaranteed loan and release of the escrow amount by the participating financial institution, the CAR shall return the cooperative agreement funds placed in escrow to the U.S. EPA. Alternatively, the CAR may, with EPA approval,
    - b. Guarantee additional loans under the terms and conditions of the agreement or,
    - c. amend the terms and conditions of the agreement to provide for another disposition of funds that will redirect the funds for other brownfields related activities.